No. 14704

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, INTERNAL REVENUE SERVICE,

Appellee.

Appeal From the Judgment of the United States District Court for the Southern District of California.

Petition of Lloyd M. Tucker, Special Agent, Internal Revenue Service, for Rehearing En Banc.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant United States Attorney,
Chief, Tax Division,
ROBERT H. WYSHAK,
Assistant United States Attorney,
808 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

HARRY D. STEWARD,
HOWARD R. HARRIS,
Assistant United States Attorneys,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit, Mathews and Fee, Circuit Judges, and Foley, District Judge:

Lloyd M. Tucker, Special Agent, Internal Revenue Service, the appellee herein, by and through his attorneys of record, hereby petitions this Honorable Court to rehear the above-entitled case, and upon rehearing to grant the relief prayed for.

On September 21, 1956, this Court set aside the order of the District Court holding Evelyn Hubner in contempt. In so doing, the Court remanded the case to the District Court for further proceedings in accordance with its opinion. In setting aside the order holding the appellant in contempt, and in prescribing the procedure to be followed on remand, we respectfully submit, the Court fell into error.

Since the procedure to be followed on remand is of great importance herein and generally, and the briefs and arguments heretofore considered by this Court did not cover these points, and because, it is respectfully submitted, the procedure set forth in the Opinion is not in accordance with the Internal Revenue laws and the United States Constitution, a rehearing should be granted. A similar question of the procedure to be followed on remand is presented by the Government's petition for rehearing in *Local 174, International Brotherhood of Teamsters v. United States,* Docket No. 14,746, and it is respectfully suggested that rehearing *en banc* be granted in both cases, so that uniform rules of procedure may be laid down after hearing arguments of counsel on the subject.

GROUNDS FOR REHEARING.

I.

The Order Holding Appellant in Contempt Was Supported by a Finding Based on the Evidence That the Books, Records and Other Documents Set Forth in the Summons Were Material to the Investigation and by the Finding, Supported by the Evidence, That the Demands of the Summons Were Reasonable.

This Court correctly held that Internal Revenue Code of 1954, Section 7605(b) did not apply here. (Slip Op. 2.) It also correctly decided that the trial court held a hearing, and carefully considered appellant's contentions. (Slip Op. 5.) It further correctly held that the trial court had the right to order appellant to produce particular identified documents in Court. (Slip Op. 5.)

This Court did fall into error, we respectfully submit, in setting aside the trial court order holding Evelyn Hubner in contempt for failure to comply with the Court's previous order to deliver to the Clerk of the Court the books, papers and documents summoned, thus concluding that the materiality of the books, records and documents summoned was not determined by the trial court. (Slip Op. 4-5.)

Section 7602 of the Internal Revenue Code of 1954, is divided into three subsections, each of which authorizes separate investigative actions by the Secretary of the Treasury or his delegate. Each section, however, sets out the same *alternative* conditions to examination or summons or taking of testimony, that is, each requires that the examination or production of data or testimony be "relevant *or* material." (Emphasis supplied.)

In two places in the Opinion, page 4 of the slip sheet and page 5 of the slip sheet, it is implied that the materiality of the documents in question was not adjudged. The finding of the Court, Finding X [R. 74], is to the contrary. Support for such finding is found in the affidavit of Henry N. Miller. [R. 52.] Under Section 7602(b) a determination of materiality *or* relevancy is sufficient. The finding of materiality, supported by the evidence, satisfied the Code requirement. It goes without saying, a finding of the trial court supported by substantial evidence must be sustained. (*United States v. Star Kist Foods, Inc.,* ..... F. 2d ..... (9 Cir., Sept. 21, 1956).)

The Internal Revenue Code of 1954, Section 7603, states as follows:

> "* * * When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty."

In enacting the Internal Revenue Code of 1954 the Congress brought into the 1954 Code without any substantial change a similar provision which for many, many, years was found in Section 3615(d) of the Internal Revenue Code of 1939.

The trial court found [R. 69]:

> "The demands of the summons are not unreasonable under the facts of the case before the Court."

This is a finding of the trial court. [Finding XI, R 75.] We respectfully submit that the foregoing finding of the trial court satisfies the requirement of the Internal Revenue Code and the Fourth Amendment of describing the books and documents with reasonable certainty.

II.

The Proposed Procedure of Requiring the Testimony of a Witness Before Issuing an Administrative Summons Is an Onerous Condition Not Contained in the Internal Revenue Code and Repugnant to Its Letter and Spirit.

Procedurally the method enunciated by this Court (Slip Op. 4) not only imposes "an unreasonable burden on the trial court" (Slip Op. 6) but is repugnant to the letter and spirit of the statutes, the procedure described by the Congress, and a departure from all previous case law.

For example, under Internal Revenue Code, Section 7602(1), the agent may examine books, papers, documents, without summoning anyone or taking testimony. Under Section 7602(2) the agent may summon a person to produce books, etc., and to give testimony. The statute contains no requirement that one precede the other. Moreover, under Section 7605(a) there must be a ten-day notice given the witness before appearance in response to a summons. This Court's suggested *modus operandi* would require two proceedings with a minimum of ten days wait between each.

The administrative unfeasibility of the procedure outlined by this Court must be pointed out to this Court so that in its wisdom it may seek to reconcile the procedures set forth by Congress with proper respect for the Constitutional rights of third party witnesses.

It is respectfully submitted that this Court has confused the requirement of showing the materiality *or* relevancy of summoned documents contained in Section 7602(1), (2) and (3), with the different requirement of describing with reasonable certainty the documents summoned, contained in Section 7603. We respectfully suggest that the

trial court had adequate opportunity to adjudge the reasonable certainty of the description of the documents summoned and so found. [R. 69 and Finding XI, R. 75.]

III.

It Is Not Necessary to Obtain the Consent of a State Court Having Jurisdiction Over the Administrator of an Estate to the Issuance of an Internal Revenue Summons Directed to the Administrator Because of the Supremacy of the Federal Law Under the United States Constitution.

This Court apparently held (Slip Op. 3-4) that as Evelyn Hubner was the executrix of the estate of her deceased husband the consent of the state court having jurisdiction of probate should be asked before any papers, etc., held by her as executrix could be examined or ordered to be produced.

In support of this proposition, this Court has cited (Note 4, Slip Op. 3) two cases, *McCan v. The First National Bank of Portland,* 139 Fed. Supp. 224, affirmed, 9 Cir., 229 F. 2d 859, and *In re Gorday Garment Co.,* 2 Fed. Supp. 162, affirmed *sub nom., Crocker v. Kay,* 9 Cir., 62 F. 2d 391, certiorari denied, 288 U. S. 615. The *McCan* case properly held that a district court has no diversity jurisdiction of the propriety of a widow's allowance under Oregon statutory probate law. It was an exclusive matter for the determination in Oregon courts of probate jurisdiction.

In re Gorday properly held that a bankruptcy court's summary jurisdiction did not extend to a proceeding to compel an administratrix of an assignee for the benefit of creditors to turn over property in her possession to the trustee in bankruptcy. Neither case, we respectfully submit, has any bearing whatever on the power of the

federal government, under United States Constitution, Article I, Section 8, "to lay and collect taxes."

Under this supreme power, as well as under United States Constitution, Amendment XVI, the Internal Revenue enactments of the Congress are the supreme law of the land subject to no diminution by state action.

For example, state statutes of limitations upon filing claims in probate proceedings must yield to federal supremacy in the Internal Revenue field. (*United States v. Summerlin,* 310 U. S. 414 (1940).)

Likewise, in probate proceedings state laws of priority must give way to federal statutes of priority of taxes in an insolvent estate. (*Estate of Muldoon,* 128 Cal. App. 2d 284 (1954).)

Similarly, state laws promulgating homestead exemptions are of no effect with respect to federal taxes because of the supremacy of the federal taxing power under the Constitution of the United States. (*United States v. Heffron,* 158 F. 2d 657 (9 Cir., 1946), cert. denied 331 U. S. 831.)

Similar principles are enunciated in administrative summons cases dealing with state enactments of testimonial privilege. In *Falsone v. United States,* 205 F. 2d 734 (5 Cir., 1953), the Court of Appeals for the Fifth Circuit held that a state enacted accountant-client privilege had no force or effect on an internal revenue summons. In the case of *In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122 (2 Cir., 1953), the Second Circuit held that state statutes of privilege would not bar an Internal Revenue summons with respect to hospital records.

In case after case, the United States Supreme Court has enunciated the principle of supremacy of federal law

in the field where state statutes and federal internal revenue law conflict. (*United States v. Security Trust and Savings Bank of San Diego,* 340 U. S. 47 (1950); *United States v. Acri,* 348 U. S. 213 (1955); *United States v. London & Liverpool & Globe Ins. Co.,* 348 U. S. 217 (1955); *United States v. Scovil,* 348 U. S. 220 (1955); *United States v. Colotta,* 350 U. S. 808 (1955); *United States v. White Bear Brewing Co., Inc.,* ..... U. S. ..... (Apr. 9, 1956).)

The impracticality of the announced rule is demonstrated by the obstacles that could be thrown into all investigations and proceedings in federal courts were it to be widely adopted. No longer would a federal court subpoena reach records of any state, county or city. By devices such as receiverships, guardianships and other estates coming under state jurisdiction, taxpayers could surround their affairs with a cloak of immunity, only to be pierced if at all, by long and expensive proceedings through the many trial and appellate courts of the forty-eight divers states.

Conclusion.

To summarize, the appellee urges this Court to reconsider the adequacy of the trial court's determination of the materiality and sufficiency of the subpoena and affirm the court below.

In any event, appellee respectfully urges this Court to reconsider and eliminate from its opinion any state law strictures on Internal Revenue investigations and any instructions as to procedure on the summons to produce books and records which are unworkable and at variance with the statutory and case law and which impose oppressive burdens on investigative agencies and the district courts.

Prayer.

Wherefore, the appellee prays that this Honorable Court grant his petition for rehearing *en banc* with reargument of the case if deemed advisable by the Court, and that it affirm the decision below.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. MCHALE,
Asst. United States Attorney,
Chief, Tax Division,

ROBERT H. WYSHAK,
Asst. United States Attorney,
Attorneys for Appellee.

HARRY D. STEWARD,

HOWARD R. HARRIS,
Assistant United States Attorneys,
Of Counsel.

October 19, 1956.

Certification.

It is hereby certified by counsel for the appellee in the above-entitled case that this petition for rehearing is presented in good faith and in his judgment it is well founded because of the importance of the issues involved to the proper and efficient administration of the internal revenue laws, and in nowise is it interposed for the purposes of delay.

EDWARD R. MCHALE,
Asst. United States Attorney,
Chief, Tax Division,
Counsel for Appellee.

October 19, 1956.